

ADVISORY OPINION NO. 96-23

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON JUNE 6, 1996

PERSON SEEKING OPINION

Candidate for County Commission

OPINION SOUGHT

Is it a violation of the Ethics Act or WV Code 61-10-15 for a County Commissioner to be employed by a County Hospital?

Is it a violation of the Ethics Act or WV Code 61-10-15 for the requester to seek election to the County Commission when her spouse serves as the Director of a Public Service District in that County?

FACTS RELIED UPON BY THE COMMISSION

The requester is a candidate for the County Commission and is also employed by a County owned, not for profit hospital in that County. The County Commission has not provided regular financial support to the hospital but has, in the past several years, given the hospital monetary gifts which have assisted its operations. The hospital is run by a Board of Trustees whose members are appointed by the County Commission.

The requester's spouse is employed as the Manager of a Public Service District in the same County. The County Commission also appoints all members of the PSD and, pursuant to WV Code 16-13A-2, has discretion over many operations of the PSD.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code 6B-2-5(b)(1) provides in pertinent part that... A public official or public employee may not knowingly and intentionally use his...office or the prestige of his...office for his...own private gain or that of another person...

West Virginia Code 6B-1-2(c) states in pertinent part that...the state government...and local governments have many part-time public officials...serving in elected...capacities; and that certain conflicts of interest are inherent in part-time service and do not, in every instance, disqualify a public official...from the responsibility of voting or deciding a matter; however, when such conflict becomes personal to a particular public official..., such person should seek to be excused from voting, recused from deciding, or otherwise relieved from the obligation of acting as a public representative charged with deciding or acting on a matter.

West Virginia Code 61-10-15 states in pertinent part that...It shall be unlawful for any member of a county commission...or any member of any other county or district board, or for any county or district officer to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract or service or in furnishing any supplies in the contract for, or the awarding or letting of, which as such member he may have any voice, influence or control.

ADVISORY OPINION

The Ethics Act

In considering this request, the Ethics Commission has analyzed the facts presented in light of the statutory violations contained in the Ethics Act. The Commission has determined that there is no provision of the Ethics Act which would prohibit the requester from serving as a County Commissioner while being employed by the County Hospital and/or while her spouse is Manager of a County Public Service District.

Pursuant to West Virginia Code 6B-1-2(c), a part-time elected official should seek to be excused from voting, deciding or otherwise acting on a matter that has become "personal" to him. The Commission has defined "personal" as situations where the public official has any direct or indirect pecuniary interest in the matter, is affected in a manner which may influence his vote, or when voting would give the appearance of impropriety. In order for a public official's recusal to be effective he must physically remove himself from the room during the discussion and decision making process.

However, the Commission ruled in Advisory Opinion #95-06 that the voting prohibition contained in WV Code 6B-1-2(c) does not apply to actions which involve the creation of laws, rules, regulations or policies which affect the public official's or his family member's financial interests as a **member of a class**. There is no conflict of interest if the public official or his family member is not pecuniarily affected to a greater extent than any other member of a profession, occupation or class.

Therefore, the Commission finds that the requester, if elected, should not vote on matters regarding the County Hospital or the PSD that employs her spouse, if those matters would uniquely affect her or her spouse to a greater extent than other comparable employees. This includes voting on members of the Hospital Board of Trustees and the Board of Directors of the County PSD.

West Virginia Code 6B-2-5(b)(1) provides that a public official may not use his office or the resulting prestige for his own private gain or for the private gain of another. Consequently, if the requester is elected, she may not use her status or influence as a County Commissioner to obtain, increase or promote her personal interests as an employee of the County Hospital or the interests of her spouse as the Manager of the Public Service District located in that County.

However, the Commission's determination that there is no violation of the Ethics Act under the facts presented, is academic in light of the prohibition against any direct or indirect pecuniary interests in public contracts established in WV Code 61-10-15 and discussed below.

West Virginia Code 61-10-15

West Virginia Code 61-10-15 provides that it is a criminal violation for any County officer to have a direct or indirect financial interest in the proceeds of any contract if he has voice, influence or control over the letting of such contract. Any person who violates this provision is guilty of a misdemeanor and subject to removal from office. The Commission is without Authority to grant exemptions from this provision.

The Supreme Court of Appeals of West Virginia, in *Fisher v. Jackson*, 107 W.Va. 138. 147 S.E. 541 (1929), held that recusal of a public official from voting on a particular matter in which he has a direct or indirect interest was not sufficient to immunize that official from the sanctions now contained in WV Code 61-10-15.

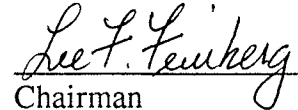
In Advisory Opinion #93-05 the Ethics Commission found that the power of the County Commission to appoint the members of a PSD and the broad discretion the County Commission exerts over a PSD pursuant to WV Code 16-13A-2 was sufficient to give a County Commissioner voice, influence or control over the PSD's service contracts. The Ethics Commission also finds that this position gives a County Commissioner control over the PSD's employment contracts. The Court, in *Cimino v. Bd. of Ed. of Marion Co.*, 210 S.E. 2d 485 (1974), applied the provisions of WV Code 61-10-15 to employment contracts.

Therefore, it would be a violation of WV Code 61-10-15 for the requester to serve as a member of the County Commission while her spouse is employed as the manager of that County's PSD.

As previously noted, the requester is employed by the County Hospital. Although the County Commission has not provided regular financial support to the hospital it has, in the past several years, given the hospital monetary gifts which have assisted its operations. Further, the hospital is run by a Board of Trustees whose members are appointed by the County Commission. Pursuant to WV Code 7-3-15, this Board of Trustees is responsible for the employment of and compensation for all professional, technical and other employees, skilled or unskilled.

The Commission finds that the authority of the County Commission to appoint all members of the Board of Trustees of the County hospital does give the Commission voice, influence or control over the employment contracts of the County hospital.

Therefore, it would be a violation of WV Code 61-10-15 for the requester to serve as a County Commissioner while being employed by the County Hospital.


Chairman